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IN THE

Supreme Court of the United States

TERM, 1977

76-1691

PASQUALE MATASSINI,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

Supreme Court of the United States

TERM, 1977

NO. 75-100

PASQUALE MATASSINI,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner as named above respectfully prays for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on March 24, 1977. Petition for Rehearing was timely filed and was denied by the Fifth Circuit on April 29, 1977. A certified copy of the judgment of the Fifth Circuit as to the above named Petitioner was filed on March 24, 1977.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in Appendix I hereto.

JURISDICTION

Jurisdiction of this Court is invoked under 28 USC Section 1245(1) and 28 USC, Supreme Court Rules, Rule 19 1(b).

QUESTIONS PRESENTED

I. Whether the District Court in denying Motion for Severance in behalf of the Petitioner violated Petitioner's rights to a fair and impartial trial.

II. Whether the Trial Court correctly interpreted Rule 609(b) FRE and Rule 405(a) FRE.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States:

Amendment V.

". . . nor be deprived of life, liberty or property without due process of law . . ."

STATEMENT OF CASE

The Petitioner was indicted in the United States District Court for the Middle District of Florida for conspiracy to possess counterfeit money (Count I) transfer of counterfeit money (Count II) and possession of counterfeit money (Count III). After the completion of the Government's case, the Trial Court granted judgment of acquittal as to Counts II and III and allowed the Jury to consider Count I, that is the conspiracy count. Your Petitioner was charged along with a co-defendant, who were both found guilty of Count I, conspiracy to possess counterfeit money.

Your Petitioner filed pre-trial Motion for Severance and duly renewed said motions at different stages of the proceedings each time additionally bringing forth to the Court substantive grounds for the granting of the severance. The Trial Court denied Motion for Severance and was affirmed by the Fifth Circuit Court of Appeals in its opinion.

Further, the Petitioner, Pasquale Matassini, took the witness stand and testified in his own behalf during which time the Trial Court allowed Government Prosecutor to cross-examine on previous convictions, one of which was over twenty-five years old. The other minor conviction involved assault which had no relevancy to the issue at Bar. Objections were lodged and the Trial Court overruled the objection and allowed such examination pursuant to FRE 609(b) and 405(a). The Appellant Court also sustained the Trial Court's ruling as to this procedural aspect of interrogation of your Petitioner.

Petitioner herein seeks review of the decision rendered by the Fifth Circuit Court of Appeals in this cause.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals erroneously fails to decide an important question of Federal law which has not been but should be settled by this Court, and said decision is in conflict with the decision of another Court of Appeals on the same matter.

The thrust of Petitioner's appeal centered upon the question whether the District Court properly denied severance to this Petitioner and further whether examination of this Petitioner far exceeded the guide lines and confines of the new Federal Rules of Evidence.

It is Petitioner's contention that the Appellate Court has side stepped the fundamental issues presented in Petitioner's appeal in that it did not fully comprehend decided case law not only of the Fifth Circuit Court of Appeal but of the other courts which had direct relevancy and applicability to the severance issue.

Furthermore, the Appellate Court has construed the Federal Rules of Evidence in Petitioner's opinion contrary to that which it is intended for and applied to therefore requiring that this court consider such interpretation by the Appellate Court and issue the Writ requested herein so that a final determination by this Court relative to the issue herein involved can be finally brought to rest.

A. WHETHER THE DISTRICT COURT IN DENYING MOTION FOR SEVERANCE IN BEHALF OF THE PETITIONER VIOLATED PETITIONER'S RIGHTS TO A FAIR AND IMPARTIAL TRIAL.

Under the provisions of Rule 14 FRCP it is well established that granting of a severance is within the sole discretion of the Trial Judge. *Opper v. U.S.*, 348 U.S. 84 (1954) but it is Petitioner's strong urging herein that the Appellate Court in sustaining the decision of the Trial Court not to grant a severance has not followed the prevailing and controlling law of the Fifth Circuit and other courts which clearly mandate a severance in the case at Bar. *Byrd v. Wainwright*, 428 F.2d 1017 (5th Cir. 1970); *U.S. v. Echeles*, 352 F.2d 892 (7th Cir. 1965); *U.S. v. Burke*, 495 F.2d 1226 (5th Cir. 1974); *U.S. v. Cochran*, 499 F.2d 380 (5th Cir. 1974); and *U.S. v. Diez*, 515 F.2d 892 (5th Cir. 1975).

As an example of the Appellate Court not following the decision of that very court cites *U.S. v. Martinez*, 486 F.2d 415 (5th Cir. 1973), in which it says:

> "Under Rule 14 of the Federal Rules of Criminal Procedure, it is established that the granting of a motion for a severance is a matter within the discretion of the trial judge. Opper v. United States, 1954, 348 U.S. 84, 75 S.Ct. 158, 99 L.Ed. 101; Smith v. United States, 5 Cir. 1967, 385 F.2d 34, 37. When an appellant challenges the refusal of a trial judge

to grant a motion to sever, he shoulders the burden of making a clear showing that 'prejudice resulting in the denial of a fair trial' flowed from the failure to grant the motion. United States v. Nakaladski, 5th Cir. 1973, 481 F.2d 289; United States v. Iacovetti, 5th Cir. 1972, 466 F.2d 1147, 1153, Smith v. United States, supra.

The question then is whether depriving one defendant of the opportunity to use the exculpatory testimony of a co-defendant amounts to 'prejudice resulting in the denal of a fair trial.'

Byrd v. Wainwright, 5 Cir. 1970, 428 F.2d 1017, was a state habeas corpus case, governed by 14th Amendment Due Process considerations rather than by the corresponding relief from prejudicial joinder provisions of Rule 14, F.R.Crim.P. But the criteria are similar, and in Byrd this Circuit was presented with the opportunity to consolidate and catalogue prior rulings for the guidance of trial judges confronted with motions for severance based on a desire to offer exculpatory testimony of a co-defendant. Byrd sets forth the following guidelines: (i) the movant should 'show that the testimony would be exculpatory in effect'; we cautioned that such a showing would not require the equivalent of a statement under oath by the co-defendant whose testimony was sought, op.cit. at 1020; Smith v. United States, supra, at 38; (ii) the movant should show to the Court's satisfaction that the co-defendant will in fact testify; in this respect we cautioned that 'the inquiry is not as to the certainty whether the co-defendant will or will not testify but the likelihood'; op.cit. at 1022; Smith, supra, at 38. and (iii) we properly consider the exculpatory nature and the significance of the desired testimony to the movant's defense, which 'might be restated in terms of the extent of potential prejudice to the defendant if the defendant is tried without the opportunity to elicit the co-defendant's testimony',

op.cit. at 1020; United States v. Echeles, 7 Cir. 1965, 352 F.2d 892, 897-898.

The Fifth Circuit in the case at Bar suggests that Petitioner did not present testimony which was sufficiently exculpatory to require a severance. That finding is erroneous and a mere reading of the record will reveal that contrary to the opinion of the Appellate Court Petitioner did counter in Edwards' testimony his dealings with the two critical Government witnesses, Wester and Loocerello.

B. WHETHER THE TRIAL COURT CORRECTLY INTERPRETED RULE 609(b) FRE AND RULE 405(a) FRE.

The opinion of the Appellate Court in returning to the interpretation of FRE 609(b) and 405(a) is erroneous.

Since the Rules of Evidence have just been published and taken effect this Court should grant certiorari for the purpose of determining the propriety of the rules relative to the rules involved in the issues of this case and make a determination whether the broad construction allowed by the trial court and affirmed by the Appellate Court was in keeping with the proposed reasons for the rule as the same were intended by Congress and in so doing Petitioner most urgently requests that this Honorable Court determine the provisions of Rule 405(a) and 403 as the same are related to Rule 609(b). If this court does so, it must issue a Writ of Certiorari and conclude that *Michelson v. U.S.* 355 U.S. 469 (1948) should not be the prevailing law as has now been modified by the Rules of Evidence the Writ should issue to resolve this conflict.

CONCLUSION

Petitioner herein respectfully asks that a Writ of Certiorari issue in this cause upon the law which clearly establishes a conflict and one which this court should consider and resolve.

Respectfully submitted,

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PROOF OF SERVICE

I HEREBY CERTIFY that all parties required to be served herein have been served and further certify that three copies of the foregoing Petition for Writ of Certiorari have been served upon the United States Solicitor General, Department of Justice, Washington, D.C. 20530, and upon the Office of the United States Attorney for the Middle District of Florida, United States Post Office Building, Tampa, Florida, by mail, this 3rd day of June 1977.

LAW OFFICES OF HENRY GONZALEZ

Henry Gonzalez

HENRY GONZALEZ

UNITED STATES of America,
Plaintiff-Appellee,

v.

Jack Gonzalez EDWARDS and
Pasquale Matassini,
Defendants-Appellants.

No. 76-1321

United States Court of Appeals,
Fifth Circuit.

March 24, 1977.

Defendants were convicted in the United States District Court for the Middle District of Florida at Tampa, Wm. Terrell Hodges, J., of conspiracy to possess counterfeit money. Defendants appealed. The Court of Appeals, Fay, Circuit Judge, held that it was not shown that a "contingency fee" informer was employed, that motions for severance had been properly denied, that government counsel had properly been allowed to cross-examine character witnesses regarding one defendant's arrest and conviction record, that cross examination by counsel regarding illegal activities of a government had been properly restricted and that evidence was sufficient to sustain the verdict.

Affirmed.

1. Criminal Law — 1186.1

Where there was a failure to agree to informer's request for percentage of money seized and where neither defendant was known to secret service before informant came to them with information of alleged conspiracy, reversal of convictions for conspiracy to possess counterfeit money was not required on ground that informer had contingent fee agreement with secret service to produce evidence against defendant; agent's statement that reward depended on "final results" was

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insufficient to require reversal on such ground. 18 U.S.C.A. §§371, 472, 473.

2. Criminal Law — 1166(6)

Codefendant's testifying and his impeachment by prior conviction did not prejudice defendant's case in any way, and any possible misunderstanding of such testimony by jury was explained by court's instructions, and denial of severance to defendant was thus not prejudicial. Fed.Rules Crim.Proc. rule 14, 18 U.S.C.A.

3. Criminal Law — 622(3)

Where codefendant proffered his testimony on direct examination to the court, and proffer and filing of motion for severance both took place after Government had rested its case, trial judge properly used his discretion in deciding whether testimony was exculpatory. Fed.Rules Crim.Proc. rule 14, 18 U.S.C.A.

4. Criminal Law — 622(3, 4)

Under circumstances, e.g., where codefendant in his proffered testimony personally denied speaking with defendant concerning counterfeit money and his testimony did nothing to counter defendant's dealings with other persons, trial judge correctly found that such testimony by codefendant would not be sufficiently exculpatory to require severance, and where the motion for severance was made after Government had rested its case following three days of trial, motion was also untimely, and there was no abuse of discretion in denying severance. Fed.Rules Crim.Proc. rule 14, 18 U.S.C.A.

5. Witnesses — 274(2)

Allowing cross-examination of character witness for defendant about his knowledge of prior conviction and arrest of the defendant was not shown to have been an abuse of discretion. Federal Rules of Evidence, rule 405, 28 U.S.C.A.

6. Witnesses — 345(1)

Allowing evidence of convictions under rule which places ten-year limitation on time within which evidence of conviction may be used to impeach witness is meant to impeach witness with respect to his truth and veracity, and, also, limiting of time for use of convictions allows for rehabilitation of such witness, and the ten-year limitation is not to be read in conjunction with rule authorizing cross-examination in respect to testimony as to reputation or testimony in form of opinion. Federal Rules of Evidence, rules 405, 405(a), 609(b), 28 U.S.C.A.

7. Witnesses — 352

Where defendant called witness to testify to bad character of two prosecution witnesses, such attempt to bring out on direct examination of his own witness specific instances of conduct or extrinsic evidence was specifically prohibited by rule. Federal Rules of Evidence, rules 608, 608(b), 28 U.S.C.A.

8. Criminal Law — 1159.2(4)

Test of sufficiency of evidence to support convictions was whether it appeared to Court of Appeals, viewing evidence in light most favorable to Government, that reasonable jurors could find the evidence, direct or circumstantial, inconsistent with every hypothesis of innocence.

9. Conspiracy — 47(3)

Ample evidence sustained conviction for conspiracy to possess counterfeit money. 18 U.S.C.A. §§ 371, 472, 473.

Appeals from the United States District Court for the Middle District of Florida.

Before GEWIN, GEE and FAY, Circuit Judges.

FAY, Circuit Judge:

Appellants, Pasquale Matassini and Jack Gonzalez Edwards appeal their conviction for conspiracy to possess counterfeit money.[1]

The issues presented by appellants are:[2]

1. Whether the court erred in denying appellants' motions to dismiss or for mistrial on the allegation that a "contingent fee" informer was employed. (Matassini and Edwards)

2. Whether the court erred in denying appellants' motions for severance. (Matassini and Edwards)

3. Whether the court erred in permitting government counsel to cross-examine character witnesses regarding appellant-Matassini's arrest and conviction record. (Matassini)

4. Whether the court erred in denying appellant-Matassini's motion to dismiss or for mistrial for the government's failure to disclose consideration given to an informer/witness. (Matassini)

5. Whether the court erred in restricting cross-examination by counsel regarding illegal activities of a government witness. (Matassini)

6. Whether the evidence was sufficient to sustain the jury verdict. (Matassini and Edwards)

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[1] 18 U.S.C. §§ 371, 472, 473.

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[2] Several identical issues were raised and treated separately by both appellants. For purposes of this opinion we will combine those issues raised by both appellants and so designate above.

7. Whether the court erred in admitting certain counterfeit money into evidence. (Edwards)

8. Whether the court erred in refusing to read to the jury selected parts of the trial transcript when requested by the jury. (Edwards)

For the reasons stated below we affirm.

During the trial of this case one of the key witnesses for the prosecution was Edward Loocerello. He was indicted with the appellants but on the first day of trial it was announced he would testify for the government in return for dismissal of the charges against him. He testified that in November, 1974, he and Matassini, who were acquaintances of ten or twelve years, met in the Pad Lounge (owned by Matassini) in Tampa, Florida. Matassini took Loocerello for a drive in his car, showed Loocerello a $20, a $50, and $100 counterfeit note, and solicited his opinion as to their quality. Loocerello said the bills looked good and, after asking, was told that their price was twenty cents on the dollar. They didn't discuss the amount of counterfeit money available.

The next day Loocerello contacted an individual in El Paso, Texas in hopes of selling any counterfeit money he could purchase from Matassini.

In December, 1973, Loocerello met with Edwards in the Neptune Lounge at which time Edwards asked if Loocerello could use some $20, $50 and $100 counterfeit notes. Loocerello asked if these notes were the same ones Matassini had to which Edwards nodded and smiled, adding that up to one million dollars worth was available at twenty cents on the dollar. Loocerello met Edwards again in January, 1974, while Edwards was in the hospital. He asked Edwards for some samples of the money and, after Edwards made a phone call, Edwards told Loocerello the money would be arriving from Miami within seventy-two hours.

In mid-January, 1974, Loocerello met a man he thought was his Texas connection at the Jubilee Lounge to discuss the counterfeit deal. The contact was really Agent Woodham of the United States Secret Service. Both Woodham and Loocerello testified that during this meeting Edwards walked in and was then identified by Loocerello as the source of the counterfeit money.

Thomas Wester, a government informer, testified that he had known Matassini for many years and was formerly Matassini's supervisor at a bowling lane in Tampa. In late November, 1973, Wester was approached by Matassini at the Pad Lounge and was shown a counterfeit $20, $50, and $100 federal reserve note by Matassini. Matassini stated there was $920,000 available. The next day Wester took the bills to agents of the Secret Service who copied down the serial numbers and returned them to Wester. At that meeting Wester refused to divulge the identity of his source except that he was a bar owner. Wester also requested five percent (5%) of anything siezed for a reward. The agents told him that was unreasonable and the Secret Service did not as a practice enter into agreements with informants for a percentage. No agreement was made as to any reward. At a second meeting, the next night, Wester gave the agents Matassini's name and asked again about a reward. He was told it depended on the "final results" and Agent Williams explained that it would depend upon the results of whatever buy he was able to make or whatever amount of money they were able to seize. Still no agreement was reached and Wester never received any money for this case from the Secret Service.

Wester continued in his attempts to make a deal with Matassini and in January, 1974, Matassini gave Wester a bar tab with some telephone numbers on it and directed Wester to call the numbers. The four telephone numbers were to Edwards' house in Tampa, where Edwards could be reached in Ft. Lauderdale, Florida, and Edwards' father's law office. According to Wester,

Matassini wrote four digits of one number in his presence.

Wester also testified he called Edwards' home number, talked with Edwards' mother and found out Edwards was in the hospital. He went to the hospital that day, met with Edwards and arranged a meeting between Matassini and himself so Matassini could introduce Wester to Edwards. That night a meeting took place at the Pad Lounge and Matassini made the introduction. Wester and Edwards talked about the counterfeit money, in particular, price, quality and quantity. Edwards agreed to get in touch with his contact to work out further details. A price of twenty to twenty-five percent was quoted.

A week or so later Wester saw Loocerello, who he had met in mid-December, 1973, through Matassini, at the Pad Lounge and Loocerello then identified Edwards as his source of counterfeit money. Loocerello took Wester to the airport where Wester was to leave with Edwards for Fort Lauderdale.

Richard Taylor, identified as an unindicted co-conspirator, testified that he bought one million dollars in counterfeit money for twenty thousand dollars in October, 1973. He was arrested in December, 1973, and the money was seized. His arrest was not disclosed for several weeks. The amount seized was $886,960 in $20, $50, and $100 counterfeit federal reserve notes, each denomination having twenty different serial numbers, one of which matched each of the serial numbers of the three notes given to Wester by Matassini. All the money, from both Taylor and Matassini was found to be from the same printer, press and paper.

(1) The first point on appeal is based on the doctrine set forth in *Williamson v. United States,* 311 F.2d 441 (5th Cir. 1962), concerning contingent fee informers. Both Matassini and Edwards suggest that their convictions should be reversed because Thomas Wester had a contingent fee agreement with the Secret

Service to produce evidence against appellants. We do not agree.

In *Williamson,* an informant was offered a specific sum of money for evidence against certain individuals. At the time of the offer to the informant, no evidence against the target individuals had been gathered.

The evidence in this case does not establish a contingent fee arrangement like the one condemned in *Williamson.* Viewing the evidence in the light most favorable to the government, *Glasser v. United States,* 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942), there was no specific arrangement between Wester and the Secret Service agents. The failure to agree to Wester's request for a percentage of the money seized and the fact that neither Matassini nor Edwards were known to the Secret Service before Wester came to them with the information of the alleged conspiracy prevents this case from coming within the ambit of *Williamson.* The only probative evidence of a possible contingent fee arrangement is Agent Williams' statement that a reward depended on the "final results" and we find this is not sufficient to bring this case within the *Williamson* doctrine. See *United States v. Dickens,* 524 F.2d 441 (5th Cir. 1975). This court has

> refused to extend [Williamson] . . . to the situation where an informant is paid a subsistence allowance and given a reward, as long as there is no evidence that he had been promised a specific sum to convict a particular person. (Citations omitted).

United States v. Garcia, 538 F.2d 580, 586 (5th Cir. 1976).

For the second issue, both appellants suggest the district court's denial of a severance was prejudicial to

them but each for entirely different reasons. We must determine in each case whether there was sufficient prejudice to require a severance under Rule 14 of the Federal Rules of Criminal Procedure.[3]

> The existence of prejudice, in large measure depends upon the facts and circumstances of each case . . . and it is axiomatic that the granting of a severance is within the discretion of the trial judge. [Citations omitted] The burden of demonstrating prejudice is a difficult one, and the ruling of the trial judge will rarely be disturbed on revue. [Citations omitted][4]

(2) Appellant Edwards suggests severance was mandatory because he was irreparably prejudiced by Matassini testifying and being impeached by a prior conviction.[5] Matassini's testifying and his impeachment by prior conviction did not prejudice Edwards' case in any way and any possible misunderstanding of this testimony by the jury was explained by the court's instructions. See *Blumenthal v. United States,* 332 U.S. 539, 559-560, 68 S.Ct. 248, 92 L.Ed. 154 (1947); *United States v. Perez,* 489 F.2d 51, 66 (5th Cir. 1973).

Appellant Matassini's claim for severance was based on the desire of Jack Edwards to testify on Matassini's behalf but not if Edwards' own guilt was the subject of the jury's consideration. Matassini suggests he meets the criteria set out in *Byrd v. Wainwright,* 428 F.2d 1017 (5th Cir. 1970), as a basis for

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[3] If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants . . . by such joinder for trial together, the court may order an election or separate trial of counts, grant a severance of defendants or provide what ever other relief justice requires.

[4] *Tillman v. United States,* 406 F.2d 930, 934, 935 (5th Cir. 1969.) See also *United States v. Park,* 531 F.2d 754 (5th Cir. 1976).

[5] Edwards also raised another ground but withdrew it during oral argument of this appeal.

the necessity of a severance. The criteria in *Byrd*, even though a state habeas corpus case, have been used to guide trial judges confronted with motions for severance here in this circuit. *United States v. Martinez*, 486 F.2d 15 (5th Cir. 1973); *United States v. Diez*, 515 F.2d 892 (5th Cir. 1975). Those guidelines are: (i) the co-defendant's testimony must be specifically shown to be exculpatory; (ii) the movant must show a substantial likelihood that the co-defendant will testify if the severance is granted; and (iii) the movant must show a bona fide desire to use the co-defendant's testimony.

(3) Edwards proffered his testimony on direct examination of the court. The proffer and the filing of the motion for severance both took place *after* the government had rested its case. The court below denied the motion because the testimony was not exculpatory as to Matassini as required by *Byrd* and the motion itself was untimely. On the basis of *United States v. Morrow*, 537 F.2d 120 (5th Cir. 1976), we find that the trial judge properly used his discretion in deciding whether the testimony was exculpatory. In *Morrow*, Judge Thornberry states:

> The trial judge is expressly empowered to examine the significance of the alleged exculpatory testimony in relation to the defensive theories relied upon and assess the extent to which the defendant will be prejudiced by the absence of the testimony. (Footnote omitted) Moreover, close attention to the interest in judicial economy is a permissible consideration in the trial judge's exercise of discretion. (Footnote omitted).

Supra, p. 135.

(4) After reviewing the proffered testimony of Edwards we believe the trial judge was correct in finding that the testimony was not sufficiently exculpatory to require a severance. For example, although Edwards personally denied speaking with Matassini concerning

counterfeit money, his testimony did nothing to counter Matassini's dealings with Wester and Loocerello.

The trial judge considered the timeliness of the motion and found that since the motion for severance was made after the government had rested its case following three days of trial, the motion was untimely. *United States v. Diez*, 515 F.2d 892, 903 (5th Cir. 1975). This court does not find an abuse of discretion in this decision.

(5, 6) The third assignment of error is whether cross-examination of a character witness for Matassini about his knowledge of a prior conviction and arrests of Matassini was proper.

Matassini called character witnesses, among them Dr. Joseph Ferrandes, a dentist, who testified he has known Matassini both socially and professionally for more than twenty years and Matassini, in his opinion is a truthful, honest and law abiding citizen. On cross-examination the government asked him if he had heard about Matassini's conviction for breaking and entering petit larceny and possession of burglary tools and also Matassini's arrests for assault and battery in 1956, 1961, 1970 and 1972. The witness was aware of all except the last three arrests.

In the Federal Rules of evidence, Rule 405(a) states:

> *Reputation or opinion.* In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

The Advisory Committee's Note on Rule 405, Federal Rules of Evidence cites *Michelson v. United States*, 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168 (1948),

> [wherein] cross-examination inquiry [was] allowable [to find] whether the reputation witness [had] heard of particular instances of conduct pertinent to the trait in question.[6]

This court held in *United States v. Wells,* 525 F.2d 974 (5th Cir. 1976), (citing *Michelson*), that

> Once a witness has testified concerning a defendant's good character, it is permissible during cross-examination to attempt to undermine his credibility by asking him whether he has heard of prior misconduct of the defendant which is inconsistent with the witness' direct testimony. (Citations omitted).

Supra, p. 976. *Wells* put two limitations on judicial discretion:

> . . . first, a requirement that the prosecution have some good faith factual basis for the incidents inquired about (citations omitted); and second, a requirement that the incidents inquired about are relevant to the character traits involved at the trial. (Citations omitted).

Supra, p. 977. *Wells* does not limit these instances of misconduct to just convictions; it also includes arrests.

In this case the trial judge exercised his discretion and allowed cross-examination as to the 1950 conviction and arrests, weighing the relevancy of the evidence as opposed to prejudice to the defendant. Appellant argues that Rule 609(b), F.R.E., which places a ten year limitation on the time within which evidence of a conviction may be used to impeach a witness, should be read in context with Rule 405(a), F.R.E. We cannot agree. Allowing evidence of convictions under Rule 609(b) is meant to impeach the witness with respect to *his* truth

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[6] Advisory Committee's Note, Rule 405, Federal Rules of Evidence.

and veracity and also limiting of the time for use of convictions allows for rehabilitation of that witness. But allowing cross-examination of character witnesses as to their having heard of prior convictions or arrests of a defendant shows whether he has knowledge of defendant's reputation and whether that knowledge influences his opinion in any way.

Therefore we find the trial judge did not abuse his discretion and we affirm this decision.

The fourth assignment or error is based on the government's alleged failure to disclose consideration given to witnesses. After a careful reading of the record this court finds that the government disclosed to the defendants the consideration given to Loocerello and Wester and this contention is totally without merit.

In the fifth assignment of error Matassini suggests under Rule 608 of the Federal Rules of Evidence the court improperly restricted cross-examination by counsel for appellant regarding illegal activities of a government witness. From the record in this case we note appellant has misinterpreted this rule.

(7) Appellant called witnesses to testify to the bad character of two prosecution witnesses and was prohibited by the court from inquiring on direct and re-direct examination as to specific acts of the prosecutions' witnesses. Rule 608(b) of the Federal Rules of Evidence states:

> (b) *Specific instances of conduct.* Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in rule 609, may *not* be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on *cross-examination* of the witness (1) concerning his character for truthfulness or untruthfulness,

> or (2) concerning the character for truthfulness or untruthfulness of another witness to which character the witness being cross-examined has testfied. (Emphasis added)

It should be clear from the statement of the rule itself that appellant was attempting to bring out on direct examination of his own witness (instead of cross-examination) specific instances of conduct by extrinsic evidence which is specifically prohibited by the rule. The exception does not apply in this case and appellant's argument has no merit.

(8, 9) Appellants also allege there was insufficient evidence to support their convictions. We view the evidence in the light most favorable to the government[7] and must decide whether reasonable jurors could find the evidence, be it direct or circumstantial, inconsistent with every hypothesis of innocence.[8] After reviewing the record we find there was ample evidence to support appellants' convictions on the conspiracy charge.

All other claims of error have been considered and rejected, being totally without merit. We affirm the conviction of both appellants.

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[7] *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942); *United States v. Leslie*, 542 F.2d 285 (5th Cir. 1976); *United States v. Rojas*, 537 F.2d 216 (5th Cir. 1976).

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[8] *United States v. Rojas*, 537 F.2d 216 (5th Cir. 1976); *United States v. Moore*, 505 F.2d 620, 623 (5th Cir. 1974), *cert. denied*, 421 U.S. 918, 95 S.Ct. 1581, 43 L.Ed.2d 785 (1975); *United States v. Nazien*, 504 F.2d 394, 395 (5th Cir. 1974), *cert. denied*, 420 U.S. 964, 95 S.Ct. 1358, 43 L.Ed.2d 443 (1975).

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76-1321

D. C. Docket No. 75-100-Cr-T-II

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JACK GONZALEZ EDWARDS, and
PASQUALE MATASSINI,

Defendants-Appellants.

Appeal from the United States District Court for the Middle District of Florida

Before GEWIN, GEE and FAY, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel:

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

March 24, 1977

Issued as Mandate:

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 76-1321

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JACK GONZALEZ EDWARDS
AND PASQUALE MATASSINI,

Defendants-Appellants.

Appeals from the United States District Court for the
Middle District of Florida

ON PETITION FOR REHEARING

(APRIL 29, 1977)

Before GEWIN, GEE and FAY, Circuit Judges
PER CURIAM:

IT IS ORDERED that the petition for rehearing filed on behalf of Matassini in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR TH COURT:

/s/ Peter T. Fay
United States Circuit Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76-1321

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JACK GONZALEZ EDWARDS and
PASQUALE MATASSINI,

Defendants-Appellants.

Appeals from the United States District Court for the
Middle District of Florida

O R D E R:

(√) The motion of appellant, PASQUALE MATASSINI for stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including May 29, 1977, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ Peter T. Fay
UNITED STATES CIRCUIT JUDGE